Ng Kong You & Anor v MBf Property Services Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP PETITION NO D5–28–662 OF 1999
KANG HWEE GEE J
1 AUGUST 2000

Companies and Corporations *— Winding up — Advertisement of petition — Whether petition viable — Whether advertising would cause irreparable damage to respondent — Whether — injunctive order to restrain petitioners from advertising winding-up petition against respondent should be granted*

Serangkai Emas Sdn Bhd ('the developer') was a developer of a project known as Taman Perindustrian Puchong Section 4. The petitioners entered into a sale and purchase agreement with the developer to purchase a terrace factory. A power of attorney was executed between the developer and respondent wherein the respondent had been appointed to act as the project manager of the project. The respondent offered the petitioners a 'No Interest Factory Purchase Plan' and agreed to pay all interest accrued on loan. Despite the letter of undertaking, the respondent had failed to settle the interest to the end-financier and as a result, the petitioners had to settle it instead. The respondent had also failed to respond to the petitioners' solicitors' demand for the debt. Consequently, the petitioners' solicitors presented a winding-up petition. The respondent applied to strike out the petition and for an injunctive order to restrain the petitioners from advertising the petition against the respondent.

Held, dismissing both applications with costs:

(1) Having failed to pay the balance of the interest due (after having paid some), it was clear that the petitioners had a viable petition against the respondent for debt owed to the petitioners (see p 127H).

(2) Advertising the winding-up petition is a necessary statutory requirement in the public interest so that any persons having any interest in the company may know its status. Unless the respondent can show that the petition was plainly unsustainable and was bound to fail, such that the advertising would surely cause irreparable damage to the respondent, the order should not be granted. The respondent had fallen far short of this criteria (see pp 127H–128A).

[**Bahasa Malaysia summary**

Serangkai Emas Sdn Bhd ('pemaju tersebut') merupakan pemaju satu projek yang dikenali sebagai Taman Perindustrian Puchong

Seksyen 4. Pempetisyen-pempetisyen menandatangani satu perjanjian jualbeli dengan pemaju tersebut bagi membeli sebuah kilang teres. Satu surat kuasa wakil telah disempurnakan di antara pemaju dan responden di mana responden telah dilantik sebagai pengurus projek tersebut. Responden telah menawarkan pempetisyen-pempetisyen satu 'Rancangan Belian Kilang Tanpa Faedah' dan bersetuju membayar segala faedah yang terakru daripada pinjaman tersebut. Walaupun terdapatnya surat akujanji, responden masih gagal menjelaskan faedah kepada pembiaya terakhir (end-financier) dan sebagai akibatnya, pempetisyen-pempetisyen terpaksa menjelaskan jumlah tersebut. Responden juga gagal memberi sebarang balasan kepada permintaan peguamcara pempetisyen-pempetisyen bagi hutang tersebut. Akibatnya, peguamcara pempetisyen-pempetisyen telah mengemukakan petisyen penggulungan. Responden memohon membatalkan petisyen tersebut dan memohon perintah injunksi untuk menghalang pempetisyen-pempetisyen daripada mengiklankan petisyen tersebut mengenai responden.

Diputuskan, menolak kedua-dua permohonan dengan kos:

(1) Setelah gagal menjelaskan faedah yang tertanggung (selepas membayar sebahagian daripadanya), adalah jelas bahawa pempetisyen-pempetisyen mempunyai petisyen yang sahih terhadap responden bagi hutang yang terhutang kepada pempetisyen-pempetisyen (lihat ms 127H).

(2) Pengiklanan petisyen penggulungan tersebut adalah satu keperluan statutori demi kepentingan awam supaya mereka yang mempunyai kepentingan dalam syarikat tersebut boleh mengetahui akan kedudukannya. Melainkan responden dapat membuktikan bahawa petisyen tersebut jelas tidak dapat dipertahankan dan pasti akan gagal, dan dengan demikian akan menyebabkan kerosakan yang tidak boleh dibaiki terhadap responden, perintah tersebut tidak harus ditunaikan. Responden tidak dapat mencapai kriteria ini (lihat ms 127H–128A).]

Notes

For cases on advertising of winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 760–761.

Cases referred to

MBf Property Services Sdn Bhd & Anor v Balasubramaniam K Arumugam [2000] 2 MLJ 267 (refd)

Appeal from:

Wong Rhen Yen (*Dennis Nik & Wong*) for the petitioner.
S Satharuban (*Satha & Co*) for the respondent.

Kang Hwee Gee J:

The applications

(ii) Enclosure 6 — to strike out the winding up petition presented on 9 August 1999 (encl 1).

(ii) Enclosure 8 — injunctive order to restrain the petitioners' from advertising the winding up petition against the respondent.

The facts

2.1 At all material times, Serangkai Emas Sdn Bhd ('the developer') was a developer of a project known as Taman Perindustrian Puchong Section 4.

2.2 The petitioners entered into a sale and purchase agreement dated 7 October 1996 with the developer to purchase a terrace factory known as Lot No 97-A, Phase 1A, Taman Perindustrian Puchong s 4 ('the said property') for a consideration of RM382,060.

(sale and purchase agreement — 'exh LCL-2' in the respondent's affidavit).

2.3 A power of attorney was executed between the developer and the respondent wherein the respondent had been appointed to act as the project manager of the said project.

(power of attorney — exh 'LCL-I' in the respondent's affidavit).

2.4 The respondent has vide a letter dated 7 October 1996 offered a 'no interest factory purchase plan' to the petitioners wherein the respondent has agreed to pay all interest accrued on loan disbursed by the end financier towards payment of the purchase price of the said property, directly to the end financier during the period of construction of the same until the loan is fully drawn down with the certificate of fitness for occupation (temporary, partial or final, whichever is issued first) being issued ('the letter of undertakings).

(letter of undertaking- exh 'LCL-2' in the respondent's affidavit).

2.5 Thereafter, the petitioners had obtained end financing from Sime Bank Berhad ('the end financier') to finance the purchase of the said property by executing a loan agreement cum assignment with the end-financier on 16 January 1997 ('loan agreement').

[the loan agreement cum assignment — exh 'NKY-1' in the petitioners' affidavit affirmed by the first petitioner on 5 May 2000 ('the petitioners' affidavit')].

2.6 Pursuant thereto and during the period of construction, the respondent had paid the interest owing to the end-financier up to June, 1998 by reimbursing the petitioners as evidenced by the respondent's letter dated 14-9-1998 to the first petitioner.

(The respondent's letter dated 14 September 1998 — exh 'NKY-2' in the petitioners' affidavit).

2.7 However since then and despite the letter of undertaking, the respondent has failed to settle the interest to the end-financier, and as a result the petitioners had to settle the interest to the end financier in the sum of

RM12,697.80 so as to prevent the end financier from recalling the said loan.

(The statement of account dated 13 May 1999 from the end financier — exh 'NKY-3' in the petitioners' affidavit).

2.8 The petitioners' solicitors had vide their letter dated 27 May 1999 and also a notice pursuant to s 218 of the Companies Act 1965 dated 4 June 1999 demanded from the respondent the said debt. The respondent has failed, refused and/or neglected to respond nor dispute the said demand.

(The petitioners' solicitors' letter dated 27 May 1999 and the said statutory demand — exh'NKY-4' and 'NKY-5' respectively in the petitioners' affidavit).

2.9 The petitioners' solicitors presented a winding-up petition on 9 August 1999 (encl 1).

The grounds

These are stated in detail in the supporting affidavits of Low Cheng Lai, the pengurus besar (respondent), encls 6 and 8 respectively which are similar, the relevant paragraphs of which read as follows:

(3) I crave leave of this honourable court to refer to the winding-up petition presented on 8 August 1999 ('the said petition').

(4) I crave leave of this honourable court to state the summary facts and nature of the petitioner's claim against the respondent. The petitioner's claims are briefly as follows:

(a) that at all material times, Serangkai Emas Sdn Bhd, is the developer of a project known as Taman Perindustrian Puchong Section 4;

(b) the petitioner had entered into a sale and purchase agreement dated 7 October 1996 with the developer to purchase the said property for the consideration of RM382,060;

(c) a power of attorney was executed between the developer, Serangkai Emas Sdn Bhd ('donor') and the respondent ('donee') wherein the respondent had been appointed to act as the project manager of the said project. A copy of the power of attorney is now shown and marked as exh 'LCL-1';

(d) the respondent was acting pursuant to the said Power of Attorney No 54658/95 on behalf of the developer, Serangkai Emas Sdn Bhd had agreed and undertake to pay all interest accrued on loans disbursed by the end financiers towards payment of the purchase price of the said property;

(e) the petitioner alleged that the respondent had failed to settle the interest payable to the end financier, Sime Bank Bhd in which event the petitioner has been compelled to settle the interest amounting to RM12.697.80 to the end financier.

A copy of a letter dated 7 October 1996 and the sale and purchase agreement dated 7 October 1996 is produced herewith and marked as 'LCL-2'.

(5) I further crave leave of this honourable court to refer to the said petition, I wish to inform that the developer, Serangkai Emas Sdn Bhd had been wound-up by way of an order dated 7 July 1999 at High Court of Malaya at Kuala Lumpur based on the Companies Winding Up Petition No D6-28-390-1999. A copy of the order is now produced and marked as exh 'LCL-3'.

(6) I do hereby state and verily believe that the winding-up of the abovenamed respondent is wrong in law because the abovenamed respondent was the project manager which involved in the management and administration sector Serangkai Emas Sdn Bhd. I deny any representation and that the respondent had not made representations for the benefit of the respondent's company.

(7) I am advised by my solicitor, and verily believe that the winding-up petition against the respondent is wrong in law as the respondent was only the project manager in the construction of the project for the developer who has been wound-up. In addition, I am advised and verily believe that there is no judgement or order of court against the alleged sum of RM12,697.80 owed by the respondent.

(8) I further state that the respondent is one of the subsidiaries of MBf Holdings Bhd, a public listed company in the Kuala Lumpur Stock Exchange. A copy of the company search information report is now produced and marked as 'LCL-4'. I am advised by the respondent's solicitors and verily believe that if a notice of winding-up petition is published, advertised, circulated and distributed, it will cause irreparable damage/losses to both the respondent and the MBf Holdings Bhd in which:

(a) all banking accounts and transactions of both companies will be suspended, which in turn will effect the respondent and MBf Holdings Bhd;

(b) all further tradings of the MBf Holdings Bhd will be suspended.

(9) I am advised by the respondent's solicitors and verily believe that unless restrained by the court, the petitioners may publish, advertise, circulate and distribute a notice of winding-up petition which is fixed for hearing on 23 November 1999.

(10) I further state that the respondent will file a notice of motion to strike out the above said winding-up petition based on the merits of the abovementioned grounds.

(11) The respondent undertakes to pay any damages in case the court should hereafter be of the opinion that the petitioners shall have sustained any loss or damage, which the applicant ought to pay, by reason of the grant of an injunction.

The issues

For encl 6 (striking out petition), whether the petitioner's petition is plainly unsustainable.

For encl 8 (injunctive order), whether there is a basis to make the application.

Findings on both encls 6 and 8

The letter of undertaking, exh LCL-2, in the respondents' affidavit wherein the respondent's company states:

> … in consideration of you purchasing the unit, we hereby agree to pay all the interest accrued on those portions of the loan disbursed towards the payment of the purchase price of the unit during the construction of the unit and until your loan is fully drawn down with the certificate of fitness for occupation (temporary, partial or final, whichever is issued first) being issued.

It is clear from the above that the respondent, MBf Property Services, is contracting not under the power of attorney for the developer, Serangkai Emas, from whom the petitioner had purchased the property buffer, MBf Property Services Sdn Bhd.

The same issue involving the same respondent MBf Services — whether the respondent was contractually bound to settle the interest had already been decided by the Court of Appeal in *MBf Property Services Sdn Bhd & Anor v Balasubramaniam K Arumugam* [2000] 2 MLJ 267, [2000] 2 CLJ 230 wherein it was ruled that:

> Held:
>
> (1) The three documents, namely the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction.
>
> (2) Read as a whole, the documents had the following effect: (i) the respondent shall purchase the property from the developer at a specified price and terms provided under the sale and purchase agreement; (ii) the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued; and (iii) the second appellant will lend money to the respondent to pay for the purchase upon the mutual covenants contained in its letter of offer subject to the condition that interest will be paid by the first appellant during the relevant period.
>
> (3) In the absence of language which denotes the presence of a contrary intention, it may be presumed that the parties used the term 'certificate of fitness' as employed by the by-laws. The learned judge therefore committed no error in relying on the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 to interpret the phrase 'certificate of fitness', and ruling that it means a certificate which would entitle the respondent to occupy the subject property.

Having failed to pay the balance of the interest due (after having paid some), it is clear that the petitioner has a viable petition against the respondent MBf Property Services, as debt owed to the petitioner,

Advertising the winding up petition is a necessary statutory requirement in the public interest so that any persons having any interest in the company (whether as debtors or otherwise) may know its status. Unless the respondent can show that the petition is plainly unsustainable and is bound to fail, such that the advertising will surely cause irreparable damage to the

respondent, the order should not be granted. The respondent has fallen far short of this criteria.

Order accordingly.

Reported by Wong Ee Lynn